Supreme Court, U. S.
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In The
Supreme Court of The United States
October Term, 1979

No. 79-222

BRUCE E. ELLIS,

Petitioner,

-vs-

AMOS E. REED, Secretary of Corrections, and the Attorney General of the State of North Carolina,

Respondents.

Petition for a Writ of Certiorari
to the
United States Court of Appeals
for the Fourth Circuit

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INDEX

Opinions Below 4

Jurisdiction 4

Question Presented 4

Constitutional Provisions Involved 4

Statement of the Case 5

Nature and Course of the Proceedings 5

Statement of the Facts 6

Reasons for Granting the Writ 8

I. The Court of Appeals' Decision Misinterprets the Rule Established by This Court in *Brasfield v. United States* 8

II. The Court of Appeals' Decision That the Inquiry By a Criminal Trial Judge Into the Numerical Division of a Jury Followed by the Giving of an "Allen Charge" is Not Coercive is in Conflict With the Decisions of This Court ... 12

III. The States Are in Conflict Over the Basis of This Court's Decision in *Brasfield v. United States* 13

Conclusion 14

Appendix ..... App. I

CITATIONS

	Pages
Alford v. United States, 282 U.S. 687 (1930)	9
Allen v. United States, 164 U.S. 492 (1896)	12
Barren v. Baltimore, 7 Pet. 243 (1833)	9
Betts v. Brady, 316 U.S. 460 (1941)	9
Brasfield v. United States, 272 U.S. 448 (1926)	8 thru 14
Burton v. United States, 196 U.S. 283 (1905)	11
Davis v. Alaska, 415 U.S. 308 (1973)	10
Duncan v. Louisiana, 391 U.S. 145 (1968)	9
Jenkins v. United States, 380 U.S. 445 (1965)	13
Johnson v. Louisiana, 406 U.S. 356 (1972)	12
Jones v. Norvell, 472 F. 2d 1185 (6th Cir. 1973)	13
Kersey v. State, 525 S.W. 2d 139 (Tenn. 1975)	14
McNabb v. United States, 318 U.S. 332 (1943)	9
Palko v. Connecticut, 302 U.S. 321 (1937)	9
Patton v. United States, 281 U.S. 276 (1929)	10
People v. Wilson, 213 N.W. 2d 193 (Mich. 1973)	13
Pointer v. Texas, 380 U.S. 400 (1964)	10
Sinclair v. United States, 279 U.S. 749 (1928)	11
Sharpin v. State, 330 So. 2d 591 (Miss. 1976)	14
Smith v. Illinois, 390 U.S. 129 (1968)	10
State v. Aragon, 547 P. 2d 574 (N.M., 1978)	13
State v. Cornell, 266 N.W. 2d 15 (Iowa, 1978)	14
State v. Morriss, 476 S.W. 2d 485 (Mo. 1971)	14
Taylor v. State, 299 A. 2d 841 (Md. 1973)	13
Turner v. Louisiana, 379 U.S. 466 (1965)	12
United States v. Cardello, 316 F. 2d 606 (2nd Cir. 1963)	10
United States v. Lester, 248 F. 2d 239 (2nd Cir. 1957)	10
United States v. Massino, 275 F. 2d 129 (2nd Cir. 1960)	10
United States v. Wood, 299 U.S. 147 (1936)	10
Williams v. Florida, 399 U.S. 78 (1970)	12

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---

The Petitioner Bruce E. Ellis respectfully prays that a Writ of Certiorari issue to review the judgment and opinion for the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 25, 1979.

OPINIONS BELOW

The Order of the District Court for the Eastern District of North Carolina, Raleigh Division, dismissing the Petitioner's Petition for a Writ of Habeas Corpus, is unreported. It was entered on March 21, 1978 and is set forth in the Appendix to this Petition, *infra* (App. at pp. I-IV).

The Opinion of the Fourth Circuit Court of Appeals in which that court affirmed the order of the District Court in denying the Writ of Habeas Corpus is reported at 596 F.2d 1195 (4th Cir. 1979), and is set forth in the Appendix to this Petition, *infra* (App. at pp. V-XVII).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered April 25, 1979. A timely Petition for rehearing was denied June 11, 1979, and this Petition was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is the *Brasfield* Rule, prohibiting numerical division inquiry of a federal criminal jury, applicable to state court criminal proceedings?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution, Section One, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nature and Course of the Proceedings

The Petitioner was charged in a bill of indictment, returned by the grand jury of Vance County, North Carolina, at the January 1975 Session of Vance Superior Court, with embezzling $18,799.50 from the Provident Finance Company.

The case came on for trial at the October 11, 1976 Session of Vance Superior Court. The Petitioner entered a plea of not guilty. The jury returned a verdict of guilty. The Court entered judgment that the Petitioner be imprisoned in the custody of the North Carolina Department of Correction for not less than three nor more than five years.

The Petitioner gave notice of appeal to the North Carolina Court of Appeals. In an opinion filed on July 20, 1977, that Court found no error in the trial. *State v. Ellis*, 33 N.C. App. 667, 236 S.E. 2d 299 (1977)

The Petitioner petitioned the Supreme Court of North Carolina for a Writ of Discretionary Review of the decision of

the North Carolina Court of Appeals. That petition was denied on August 17, 1977. *State v. Ellis*, 293 N.C. 255 (1977)

The Petitioner petitioned the United States District Court for the Eastern District of North Carolina, Raleigh Division, for a Writ of Habeas Corpus, on December 29, 1977. By Judgment and Order entered on March 21, 1978, the Court, The Honorable F. T. Dupree, Jr., Judge Presiding, dismissed the petition. Petitioner gave notice of appeal on March 30, 1978, and the District Court certified, on April 7, 1978, that there was probable cause for the appeal. In an opinion filed on April 25, 1979, Judge Hoffman, joined by Chief Judge Haynesworth, affirmed the decision of the District Court. Judge Winter filed a dissenting opinion.

The Petitioner's petition for rehearing was denied on June 11, 1979.

Statement of the Facts

The Petitioner's trial in Vance County Superior Court began on the morning of Wednesday, October 13, 1976. The State offered in evidence forty-three documentary exhibits and the testimony of nine witnesses. This evidence tended to show that, from July 6, 1970 to May 7, 1974, Petitioner was manager of the Henderson, North Carolina office of The Provident Finance Company, and that, during that period, he made loans to non-existent persons. The Petitioner offered in evidence nine documentary exhibits and the testimony of twelve witnesses. This evidence tended to show that fictitious loans were made by the Petitioner but the loans were made with the knowledge and approval of Petitioner's supervisor and only for the purpose of temporarily covering delinquent accounts and with no personal financial benefit to the Petitioner.

Following the arguments of counsel, the Court instructed the jury and it retired to deliberate. Thereafter, it returned to the courtroom for additional instructions and retired to resume deliberations. It then returned to the courtroom again. The Court then inquired about the numerical division of the jury and gave the "dynamite" instruction. The jury then retired, deliberated, and returned to the courtroom with a verdict of guilty.

The length of time of these three periods of deliberation is not indicated in the Record on Appeal of this case in the North Carolina Court of Appeals. In his Petition in Federal District Court, the Petitioner *alleged* that the first period was

approximately one hour, the second period was approximately one hour, and the last period, after the inquiry into numerical division and the "dynamite" instruction, was approximately eight minutes. The Respondent denied this allegation.

In the District Court, there was no evidentiary hearing and the Court based its decision "on the record". For purposes of its decision, the Court proceeded on the premise that the inquiry about division and the "dynamite" instruction occurred after approximately three hours of continuous jury deliberation (except for a brief interval during which the jury had requested and received supplemental instructions on the question of embezzlement).

It is clear that, when the jury returned to the courtroom after the second period of deliberation, the following occurred:

COURT: Mr. Foreman, have you reached a verdict?

JURY FOREMAN: No, Your Honor, we have not.

COURT: Will you tell me numerically what is the division; not what each of you were, but the numerical division.

JURY FOREMAN: Eleven to one.

COURT: Well, I presume, ladies and gentlemen, that you realize what a disagreement means; that the time of the Court will again have to be consumed in the trial of this action. I don't want to force you or coerce you or attempt to do so in any way to reach a verdict but it is your duty to try to reconcile your differences and to reach a verdict if it can be done without the surrender of anyone's conscientious convictions; and you heard the evidence in this case, and a mistrial will mean that another jury will have to be selected to hear this case and the evidence again: and it's long and complicated. The Court recognizes sometimes that there are reasons why jurors cannot agree, but I want to emphasize the fact that it is your duty to do whatever you can to reason this matter over as reasonable men and women and attempt to reconcile your differences if it is possible without the surrender of any conscientious convictions on the part of any member of the jury. I will let you resume your deliberations and see if you can reach a verdict.

The jury then retired, deliberated (Petitioner alleged, for eight minutes), and returned the verdict of guilty.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION MISINTERPRETS THE RULE ESTABLISHED BY THIS COURT IN *BRASFIELD V. UNITED STATES*.

In *Brasfield v. United States*, 272 U.S. 448 (1926), the Court held that the inquiry by a federal criminal trial judge, into the numerical division of a deliberating jury, was coercive and constituted, by itself, grounds for reversal.

The Court of Appeals held that the rule stated in *Brasfield* has no application to state court criminal proceedings. The Court recognized that the Sixth Amendment right to trial by an impartial jury applies to state court criminal trials by virtue of the Fourteenth Amendment. But the majority reasoned that *Brasfield* announced a rule only of supervisory, not constitutional, dimension.

This conclusion, disputed in the dissenting opinion, misinterprets the fundamental meaning of *Brasfield*. Clearly, the Court in *Brasfield* was concerned with the coercive effect of the trial judge's inquiry, and its destructive effect on a criminal defendant's right to an impartial jury. The Court reasoned as follows:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive.

272 U.S. at 450.

In holding that this language was not of constitutional import, the majority below relied on the fact that no provision of the Constitution was cited. That, however, is not decisive. The absence of constitutional reference in *Brasfield* reflects nothing more than that, at the time of the decision in *Brasfield*, (1) the supervisory-constitutional distinction was insignificant, and (2) the Court frequently determined matters of constitutional import without reference to specific constitutional provisions.

(1) Today, every ruling by this Court concerning jury trial procedure in federal courts takes on a significance for state courts, depending upon whether the ruling is premised upon the Court's authority to interpret and apply the United States Constitution, or upon its supervisory power over the lower federal courts. If a ruling is based upon the Court's interpretation of the requirements of the Sixth Amendment, its holding is necessarily binding upon the states. *Duncan v. Louisiana*, 391 U.S. 145 (1968). If, however, its ruling is based upon the Court's supervisory powers, the states are not bound thereby. At the time *Brasfield* was decided, however, such a distinction was unnecessary, because as of that time, the understanding of this Court was that the Sixth Amendment laid down no rule of conduct for the states.[1] *Palko v. Connecticut*, 302 U.S. 321 (1937); cf. *Barron v. Baltimore*, 7 Pet. 243 (1833). Consequently, while the Court today may find it useful to emphasize the basis of the authority it is exercising when reviewing trial proceedings from lower federal courts, such a distinction was unnecessary for the Court in 1926.

(2) In *Alford v. United States*, 282 U.S. 687 (1930) the same Court that decided *Brasfield* held that it was reversible error for a federal trial court judge to refuse to allow the defense counsel in a criminal trial to ask a prosecution witness where that witness resided. The Court reasoned:

> To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right *and withdraw one of*

[1] The majority below cites the landmark decision in *McNabb v. United States*, 318 U.S. 332 (1943). That case is generally regarded as the first case from this Court to articulate the distinction between constitutional interpretation and the long-standing role of this Court in supervising the administration of criminal justice in the federal courts. The *McNabb* case, as well as many subsequent cases that cite the supervisory principle articulated in *McNabb*, specifically relied upon this Court's supervisory power over the lower federal courts to avoid espousing a constitutional rule that might be binding upon the state courts as well as the federal courts. At the time *Brasfield* was decided, however, there could be no concern on the part of the Court to avoid establishing a constitutional rule that might be binding upon the state courts, because at that time the ruling of this Court was that the Sixth Amendment applied only to trials in federal courts, and the due process clause of the Fourteenth Amendment did not incorporate the specific guarantees of the Sixth Amendment. *See generally, Betts v. Brady*, 316 U.S. 460 (1941); *Palko v. Connecticut*, 302 U.S. 321 (1937) and cases cited therein. Accordingly, whether the Court of 1926 rebuked a federal criminal trial court judge based upon its interpretation of the Sixth Amendment or upon its authority of supervision over the lower federal courts made very little difference.

the safeguards essential to a fair trial. (Emphasis added)
282 U.S. at 693.

Although, as in *Brasfield*, the Court found it unnecessary to cite any constitutional provisions in making its determination, few would argue that *Alford* was based upon the Court's supervisory powers rather than its interpretation of the mandates of the Sixth Amendment. *Alford* has consistently been regarded as having stated a constitutional principle. *Davis v. Alaska*, 415 U.S. 308 (1973); *Smith v. Illinois*, 390 U.S. 129 (1968); *United States v. Cardello*, 316 F.2d. 606 (2nd Cir. 1963); *United States v. Massino*, 275 F.2d. 129 (2nd Cir. 1960); *United States v. Lester*, 248 F. 2d 239 (2nd Cir. 1957); *see also Pointer v. Texas*, 380 U.S. 400, 404, 405 (1964).

It is particularly revealing that *Alford* cites *Brasfield* for the principle that reversal is mandated where a trial court removes a safeguard "essential to a fair trial." 282 U.S. at 693.

In *United States v. Wood*, 299 U.S. 147 (1936) substantially the same Court that decided *Brasfield* reviewed a federal statute that permitted government employees to sit as jurors in federal criminal cases. In that case, the Court, in expressly stating that it was reviewing the constitutionality of the statute under the Sixth Amendment, stated:

> The ultimate question is not whether Congress has changed a common law rule, but whether in reason, an absolute disqualification of governmental employees to serve as jurors in criminal cases *is essential to the impartiality of the jury.* (Emphasis added)

299 U.S. at 148.

The "ultimate question" in *Wood* closely resembles the language that the Court used in *Brasfield* in holding that the numerical division inquiry rule was "essential to the fair and impartial conduct of the trial . . ." 272 U.S. at 450.

In *Patton v. United States*, 281 U.S. 276 (1929), the same Court that decided *Brasfield*, set out what it deemed to be the elements of a jury trial as mandated by the Sixth Amendment. To each element which the Court deemed required by the Sixth Amendment, it attached the adjective *essential*. Further, in discussing the safeguards guaranteed to criminal defendants by the Sixth Amendment, the Court stated:

> The aim of the constitutional safeguards in question is a full, *fair*, and public trial, and one which shall reasonably and in all substantial ways safeguard the interests of the state and the life and liberties of accused parties. (Emphasis added) [quoting the dissenting opinion of Aldrich, J., in *Dickinson v. United States*, 159 F. 801 (1st Cir. 1908)]

281 U.S. at 294.

Such language gives further evidence of the constitutional importance that the Court in *Brasfield* attached to its ruling when it said "We deem it *essential* to the *fair* and impartial conduct of the trial . . ."

The Court of Appeals in this case noted that in *Burton v. United States*, 196 U.S. 283 (1905) the Court, in condemning an inquiry by a federal trial judge into the numerical division of a jury stated that "we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge." 196 U.S. at 308.

The majority below relied on this language to support the position that the *Brasfield* rule is supervisory. (App. p. IX) Such a reliance is misplaced. In *Sinclair v. United States*, 279 U.S. 749 (1928) the same Court that decided *Brasfield* stated:

> The jury is an essential instrumentality — an appendage — of the Court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is *essential to proper enforcement of law.* (Emphasis added)

279 U.S. at 765.

By the majority's reasoning, this language from *Sinclair* would be of a supervisory nature only. Yet, the principle in *Sinclair* clearly is of constitutional significance. Mr. Justice Stewart, speaking for this Court in *Turner v. Louisiana*, 379 U.S. 466 (1965) stated:

> The requirement that a jury's verdict "must be based upon the evidence developed at the trial" goes to the fundamental integrity of *all that is embraced in the constitutional concept of trial by jury.* "The jury is an essential instrumentality — an appendage — of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law." *Sinclair v. United States*, 279 U.S. 749, 765, 73 L. Ed. 938, 946, 49 S. Ct. 471, 63 ALR 1258. (Emphasis added)

379 U.S. at 429.

In relying on the absence of any constitutional language in *Brasfield*, on the "administration of the law" language of *Burton*, and on subsequent decisions of this Court concerning

the formal aspects of the jury,[2] the majority has misinterpreted the fundamental importance of the *Brasfield* rule. Because this is the first Court of Appeals' decision to pass on this precise question, this Court should resolve the issue and make it clear that state court criminal defendants, like federal court criminal defendants, are entitled to trial by a constitutionally impartial jury.

II. THE COURT OF APPEALS' DECISION THAT THE INQUIRY BY A CRIMINAL TRIAL JUDGE INTO THE NUMERICAL DIVISION OF THE JURY FOLLOWED BY THE GIVING OF AN "ALLEN CHARGE" IS NOT COERCIVE IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The Court of Appeals' majority held that neither the inquiry by the trial judge into the numerical division of the jury, nor the giving of the "Allen Charge"[3] immediately following the inquiry, had the coercive effect attributed to them by the petitioner. (App. p. XIV) Such a holding is in conflict with the prior decisions of this Court.

That the inquiry by the trial judge into the numerical division of the jury alone is an "improper influence upon the jury" as being coercive, and deprives the defendant of a safeguard "essential to the fair and impartial conduct of the trial," is settled. *Brasfield v. United States*, 272 U.S. 448 (1926). If a practice has a coercive effect on federal court jurors, then it has a coercive effect on state court jurors who are, after all, drawn from the same pool of citizens as federal court jurors.

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[2]The majority below cites *Williams v. Florida*, 399 U.S. 78 (1970) and *Johnson v. Louisiana*, 406 U.S. 356 (1972) in noting the distain this Court may have for "creating a constitutional strait-jacket for the states." (App. p. XI) Yet what Judge Winter stated in his dissenting opinion is true:

> The majority cites two subsequent cases in which the Supreme Court has permitted states to deviate, within certain limits, from federal practice with regard to the number of jurors and the requirement of unanimous verdicts. *Williams v. Florida*, 399 U.S. 78 (1970); *Johnson v. Louisiana*, 406 U.S. 356 (1972). I think these cases inapposite. They were concerned solely with formal aspects of the jury. I do not read them to suggest that a judge may, consistently with the Fourteenth Amendment, conduct an inquiry of the jury which has a "coercive" effect.

(App. p. XVI)

[3]*Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

It is equally clear that under some circumstances, the giving of an improper "Allen Charge" is coercive by itself, and is grounds for automatic reversal. *Jenkins v. United States*, 380 U.S. 445 (1965). As this Court noted in *Jenkins*, supra:

> Of course, if this Court should conclude that the judge's statement had the coercive effect attributed to it, the judgment should be reversed and the cause remanded for a new trial; the principle that jurors may not be coersed into surrendering views conscientiously held is so clear as to require no elaboration. (quoting the Solicitor General of the United States).

380 U.S. at 446.

In this case, the jury failed to reach a verdict after more than two hours of deliberation. After the inquiry into the numerical division of the jury *and* the giving of the "Allen Charge", the jury returned a verdict in only eight minutes. In its context, and under all the circumstances, the coercive effect of the trial judge's statements may be reasonably inferred. Cf. *Jones v. Norvell*, 472 F.2d 1185 (6th Cir. 1973)

And, in any case, a coercive effect, though not demonstrable, may be inferred as a matter of common sense. As the Court in *Brasfield* stated:

> [The] effect upon a divided jury . . . cannot properly be known to the trial judge or to the appellate courts . . . but in general its tendency is coercive."

272 U.S. at 450.

III. THE STATE COURTS ARE IN CONFLICT OVER THE BASIS OF THIS COURT'S DECISION IN *BRASFIELD V. UNITED STATES*.

As the Court of Appeals noted, there is a sharp division of authority on the issue of whether *Brasfield, supra*, states a constitutional rule to be followed in all criminal trials, or an administrative rule to be followed only in the federal courts. (App. p. VIII) The Supreme Courts of at least three states are of the opinion that *Brasfield* announces a rule of constitutional dimension, and that the inquiry into the numerical division of the jury violates a criminal defendant's constitutional rights. *State v. Aragon*, 89 N.M. 91, 547 P. 2d 574 (1976); *People v. Wilson*, 213 N.W. 2d 193 (Mich. 1973); *Taylor v. State*, 299 A.2d. 841 (Md. 1973). Still another state, on the authority of

Brasfield, has held that the inquiry into the numerical division of the jury by a trial judge must constitute error and grounds for reversal. *Kersey v. State*, 525 S.W.2d 139 (Tenn. 1975). On the other hand, other states allow the inquiry on the theory that *Brasfield* states a rule applicable only to the federal courts. *State v. Cornell*, 266 N.W.2d 15 (Iowa 1978); *State v. Morris*, 476 S.W.2d 485 (Mo. 1971); *Sharplin v. State*, 330 So.2d 591 (Miss. 1976).

The issue should be resolved by this Court so that the Sixth Amendment right to trial by jury is of equal significance in the criminal courts of all the states.

CONCLUSIONS

For all the above reasons, this Court should issue a Writ of Certiorari to the Court of Appeals for the Fourth Circuit, to review the judgment and opinion of that Court.

Respectfully submitted,

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August, 1979

APPENDIX

OPINIONS BELOW

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

No. 77-392-HC

Bruce E. Ellis,

Petitioner.

vs

Amos E. Reed, et. al.,

Respondents.

Petitioner in this habeas corpus action was convicted of embezzlement in the Vance County Superior Court on October 15, 1976. The North Carolina Court of Appeals affirmed his conviction, *State v. Ellis*, 33 N.C.App. 667 (1977), and the Supreme Court of North Carolina declined certiorari. *State v. Ellis*, 293 N.C. 255 (1977). Petitioner alleges that his constitutional right to trial by impartial jury was violated by the trial judge's inquiry into the numerical division of a deadlocked jury and his subsequent giving of the Allen or "dynamite" charge. By order of December 29, 1977, this court allowed petitioner to continue at liberty on bond pending a determination on the merits of his habeas corpus action. Respondents have now answered and moved to dismiss the petition. No factual issues being in dispute in this matter, the matter is before the court for decision on the record.

Petitioner's argument arises entirely from the following exerpt from the trial record (Record, pp. 115-116) which occurred after approximately three hours of continuous jury deliberation (except for a brief interval during which the jury had requested and received supplemental instructions on the definition of embezzlement):

COURT: Mr. Foreman, have you reached a verdict?

JURY FOREMAN: No, Your Honor, we have not.

COURT: Will you tell me numerically what is the division; not what each of you were, but the numerical division.

JURY FOREMAN: Eleven to one.

COURT: Well, I presume, ladies and gentlemen, that you realize what a disagreement means; that the time of the Court will again have to be consumed in the trial of this action. I don't want to force you or coerce you or attempt to do so in any way to reach a verdict but it is your duty to try to reconcile your differences and to reach a verdict if it can be done without the surrender of anyone's conscientious convictions; and you heard the evidence in this case, and a mistrial will mean that another jury will have to be selected to hear this case and the evidence again; and it's long and complicated. The Court recognizes sometimes that there are reasons why jurors cannot agree, but I want to emphasize the fact that it is your duty to do whatever you can to reason this matter over as reasonable men and women and attempt to reconcile your differences if it is possible without the surrender of any conscientious convictions on the part of any member of the jury. I will let you resume your deliberations and see if you can reach a verdict.

Based on this colloquy and instruction, petitioner asserts that the supplemental charge was unconstitutionally coercive and the inquiry into numerical split per se constitutional error under *Brasfield v. United States*, 272 U.S. 448 (1926).

ALLEN CHARGE

"A calmly dispassionate balanced effort on the part of a trial judge to induce a verdict does not seem to us to invade the province of the jury." *United States v. Sawyers*, 423 U.S. 1335, 1342 (4th Cir. 1970). The charge given in petitioner's case fits this rule. Although informing the jury of their duty to attempt a reconciliation of their differences, the trial judge twice cautioned that this should not be done at the price of a juror's honestly-held belief: Thus this court agrees with the North Carolina Court of Appeals' conclusion in petitioner's case that the supplemental charge of the trial judge was not coercive, in that "he assiduously stressed to the jury that its verdict was not to be bought at the price of the surrender of any of its members' conscientious convictions." *State v. Ellis*, *supra*, at 671. This contention warrants petitioner no relief.

INQUIRY INTO NUMERICAL SPLIT

In *Brasfield v. United States*, 272 U.S. 448 (1926), a federal trial judge inquired how a split jury was divided numerically, and was informed that it stood nine to three, without indication of which number favored acquittal. The Supreme Court thought the question improper, stating:

> "We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division." At 450.

The *Brasfield* rule is routinely accepted in federal trial practice, and numerical inquiries are not made. However, it is unsettled whether the Supreme Court in *Brasfield* was merely propounding a supervisory rule for its own trial courts, or was instead delineating a general constitutional principle applicable to the states through the Fourteenth Amendment. The state supreme courts are divided, with some adhering to *Brasfield*, *Taylor v. State*, 299 A.2d 841 (Md. 1973); *People v. Wilson*, 213 N.W.2d 193 (Mich. 1973); *Kersey v. State*, 525 S.W.2d 139 (Tenn. 1975), and others regarding it only as a rule of federal practice. *People v. Carter*, 442 P.2d 353 (Cal. 1968); *Joyner v. State*, 484 P.2d 560 (Okla. 1971); *Huffaker v. State*, 168 S.E2d 895 (Ga. 1969), *State v. Morris*, 476 S.W.2d 485 (Mo. 1977); *Sharplin v. State*, 330 So.2d 591 (Miss. 1976). The clearest statement of the latter position is in *Sharplin*, *supra*, at 596:

> "We conclude that *Brasfield* was not grounded in a specific constitutional provision that has subsequently been applied to the states through the Fourteenth Amendment, but was announced as a rule of procedure to be followed in the federal courts. We decline to follow this federal procedural rule because we believe that receipt of the jury's numerical division serves a legitimate purpose consonant with the trial judge's broad powers of control over the conduct of a trial: it enables the trial judge to ascertain the likelihood of agreement among the jurors."

The only federal consideration of this precise issue in a habeas context similarly concluded that *Brasfield* expounds only a supervisory federal rule. *Marsh v. Cupp*, 392 F.Supp. 1060 (D.Ore. 1975), *aff'd*, 536 F.2d 1287 (9th Cir. 1976).

The court concludes that *Brasfield* is not controlling in this case. Its requirement of reversal upon the mere inquiry itself, independent of the background of the particular case in which it is made, is logically viewed as an example of the Supreme Court's setting of rigorous standards for its own trial courts rather than as a decision on the lowest common denominator permitted the states by the Constitution. The practice is not so unduly coercive as to require a finding that it deprives a defendant of an impartial jury trial whenever it occurs.

The Fourth Circuit's opinion in *United States v. Sawyers*, 423 F.2d 1335 (4th Cir. 1970), undercuts petitioner's contention that the combination of numerical inquiry and Allen charge is constitutional error where either alone would not be. In *Sawyers*, the trial judge, prior to giving the Allen charge, not only knew that the jury was split ten to two, but know that the larger number favored a conviction. The Fourth Circuit thought the judge's knowledge of the division irrelevant in assessing the impact of the charge on the jury. 423 F.2d at 1340.

For the foregoing reasons, the court concludes that petitioner's constitutional right to trial before an impartial jury was not abridged in his conviction for embezzlement. Accordingly, respondents' motion to dismiss his petition is allowed and the action is dismissed.

SO ORDERED.

/s/F. T. Dupree, Jr.

F. T. DUPREE, JR.
United States District Judge

March 20, 1978.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 78-6175

Bruce E. Ellis, Appellant,

v.

Amos E. Reed, Secretary of Corrections, and The Attorney General of the State of North Carolina, Appellees.

Appeal from the District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

Submitted November 14, 1978 Decided April 25, 1979

Before HAYNSWORTH, Chief Judge, WINTER, Circuit Judge, and HOFFMAN,* Senior District Judge.

Roger W. Smith (Robert L. McMillan, Jr. on brief) for Appellant; (Rufus L. Edmisten, Attorney General of North Carolina, Richard N. League, Assistant Attorney General on brief) for Appellees.

HOFFMAN, District Judge:

Appellant stands convicted in the North Carolina state court of embezzling $18,799.50 from a finance company. On

*Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

direct appeal to the North Carolina Court of Appeals, the court found no error in the trial. *State v. Ellis*, 33 N.C. App. 667, 236 S.E.2d 299 (1977). Discretionary review was denied by the Supreme Court of North Carolina. The district court denied appellant's petition for a writ of habeas corpus by order entered on March 21 1978.

The issues in this case arise from questions and instructions put to the jury by the trial judge after the jury had retired to consider the case. Appellant contends that it was error for the court to inquire into the numerical division of the jury, a practice which has been prohibited in the federal courts since the decision in *Brasfield v. United States*, 272 U.S. 448 (1926). Appellant also assigns as error the giving of a supplemental modified version of the "*Allen* charge"[1] instruction.

Appellant's trial lasted three days. Following arguments of counsel, the court instructed the jury and it retired to deliberate. Appellant alleged in his petition that after about an hour of deliberation, the jury returned to the courtroom for additional instructions. After retiring and deliberating for another hour the jury again returned to the courtroom. At this time the following colloquy occured:

COURT: Mr. Foreman, have you reached a verdict?

JURY FOREMAN: No, Your Honor, we have not.

COURT: Will you tell me numerically what is the division; not what each of you were, but the numerical division.

JURY FOREMAN: Eleven to one.

COURT: Well, I presume, ladies and gentlemen, that you realize what a disagreement means; that the time of the Court will again have to be consumed in the trial of this action. I don't want to force you or coerce you or attempt to do so in any way to reach a verdict but it is your duty to try to reconcile your differences and to reach a verdict if it can be done without the surrender of anyone's conscientious convictions; and you heard the evidence in

[1] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed 528 (1896).

this case, and a mistrial will mean that another jury will have to be selected to hear this case and the evidence again; and it's long and complicated. The Court recognizes sometimes that there are reasons why jurors cannot agree, but I want to emphasize the fact that it is your duty to do whatever you can to reason this matter over as reasonable men and women and attempt to reconcile your differences if it is possible without the surrender of any conscientious convictions on the part of any member of the jury. I will let you resume your deliberations and see if you can reach a verdict.

The jury then retired, deliberated, and returned a verdict of guilty within eight minutes, according to the appellant.

Appellant did not interpose an objection to either the numerical division inquiry or the supplemental charge to the jury.

The length of time of the three periods of deliberation by the jury is not indicated in the North Carolina record on appeal. Since the court below dismissed the petition for the writ without an evidentiary hearing, we accept the alleged times as being true for the purpose of this appeal.

It is the rule of this circuit that a "calmly dispassionate balanced effort on the part of a [federal] trial judge to induce a verdict does not seem to us to invade the province of the jury." *United States v. Sawyers*, 423 F.2d 1335, 1341-42 (4th Cir. 1970). We agree with the district court that the charge given in appellant's case fits within this rule. In the brief charge that was given, the trial judge twice cautioned that it was the duty of the jurors to attempt a reconciliation of their differences, if it was possible without the surrender of any conscientious convictions on the part of any member of the jury. We find no error in the instruction and do not feel that the instruction was coercive in any manner. Indeed, as to the effect of the modified version of the "*Allen* charge", the intermediate North Carolina appellate court held that it was not coercive, but did not discuss the issue of the numerical standing inquiry although that fact is mentioned in the opinion.

We are concerned, however, by appellant's allegation that it was error for the trial court to inquire as to the

numerical division of the jury.[2] Appellant urges this court to hold that the rule announced by the Supreme Court in *Brasfield, supra*, is a rule of constitutional interpretation grounded in due process requirements, and therefore applicable to the states by reason of the Fourteenth Amendment to the United States Constitution. We disagree and hold that the *Brasfield* rule is one of judicial administration based on the supervisory powers of the Supreme Court over the federal court system. The strong language of the Court's opinion in *Brasfield* merits our careful consideration of this issue as we note that there is a sharp division of authority on the question.

In *Burton v. United States*, 196 U.S. 283 (1905), the Supreme Court condemned the practice of inquiring of a federal jury the extent of its numerical division, even though a response indicating the vote for or against conviction was neither sought nor obtained. 196 U.S. at 307. The conviction in *Burton* was reversed on other grounds, however, and federal courts of appeals remained in substantial disagreement as to whether the rule against inquiry constituted reversible error, or whether the expressions in *Burton* were hortatory only. The Supreme Court put an end to the uncertainty by holding in *Brasfield* that such inquiry of the jury constituted error *per se*:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

272 U.S. at 450.

The language "essential to the fair and impartial conduct of the trial" might be read to impart a rule of constitutional interpretation, although not necessarily so. We note that no provisions of the Constitution are cited in *Brasfield*. The succint, two-page opinion of the Court in *Brasfield* should be read in conjunction with the Court's opinion in *Burton*, from which the rule evolved. In *Burton* the Court stated that "we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge." 196 U.S. at 308. This language lends support to the view that the rule is an administrative one which is supervisory rather than constitutional.

Following the decision in *Burton*, the federal circuits split over whether noncompliance with the Court's admonition constituted reversible error, or was merely hortatory. *Brasfield* put an end to the uncertainty. Similarly, state courts are now in disagreement as to whether the rule in *Brasfield* is applicable to state trials. The district court below, in a carefully researched opinion, noted three cases where state courts have adhered to *Brasfield*; they are *Taylor v. State*, 299 A.2d 841 (Md. 1973); *People v. Wilson*, 213 N.W.2d 193 (Mich. 1973); *Kersey v. State*, 525 S.W.2d 139 (Tenn. 1975). Subsequent to the decision of the district court, the Court of Appeals of New Mexico wholeheartedly adopted *Brasfield* in *State v. Aragon*, 89 N.M. 91, 547 P.2d 574 (1976). Of the four decisions adhering to *Brasfield*, only two courts (Michigan and New Mexico) adopted *Brasfield* as a constitutional rule. The Tennessee court mentioned *Brasfield*, but then based its holding on the "inherent and the statutory supervisory power of this Court." 525 S.W.2d at 141. The Maryland opinion

[2] A review of the briefs submitted to the North Carolina Court of Appeals on direct appeal and to the Supreme Court of North Carolina on application for discretionary review indicates that the *Brasfield* question was not specifically raised on appeal. No reference is made to *Brasfield*. However, the facts surrounding the numerical inquiry of the jury were before the state courts in conjunction with the consideration of the propriety of the watered-down *Allen* charge. The language of the North Carolina provisions for post-conviction relief, 1 C Gen.Stat.N.C. § 15A-1419, and the restrictive interpretation placed upon post-conviction relief statutes by the North Carolina Supreme Court, *State v. White*, 274 N.C. 220, 162 S.E. 2d 473, 480 (1968), make it extremely unlikely that appellant has available any avenues of relief in the state courts. We therefore decline to dismiss or remand this issue for non-exhaustion of state remedies. See: *The North Carolina Post-Conviction Hearing Act: A Procedural Snare*, 55 N.C. L. Rev. 653, et seq. Moreover, the petitioner's sentence would probably be terminated before the precise issue can be decided. While this would not moot the question, it is additional reason for us to decide the case at this time.

discussed *Brasfield* at length, but considered "the total conduct of the trial judge" in holding that the appellant's constitutional right to a fair and impartial jury trial had been violated. 299 A.2d at 845. On the other hand, several courts have specifically considered *Brasfield* to be based on the Supreme Court's administrative power over the federal courts, *State v. Cornell*, 266 N.W.2d 15, 19 (Iowa 1978); *State v. Morris*, 476 S.W.2d 485, 489 (Mo. 1971);[3] *Sharplin v. State*, 330 So.2d 591, 596 (Miss. 1976). Others have allowed inquiry of the jury in the absence of coercion. *Joyner v. State*, 484 P.2d 560, 562 (Okl.Cr. 1971); *People v. Carter*, 69 Cal. Rptr. 297, 442 F.2d 353, 356 (1968); *Huffaker v. State*, 119 Ga.App. 742, 168 S.E.2d 895, 896 (1969); *Lowe v. State*, 488 P.2d 559, 561 (Col. 1971).

Only two federal courts have reached the *Brasfield* problem in habeas corpus petitions from state convictions. In *Jones v. Norvell*, 472 F.2d 1185 (6th Cir. 1973), the court reversed a lower court decision and ordered entry of the writ where the state court had said "it is incumbent on you to reach a verdict." The court found that the facts of the case indicated an invasion of jury secrecy, inquiry into the numerical division of the jury, a coercive jury charge, and a speedy return of a verdict subsequent to the charge. 472 F.2d at 1186. The court held that the "totality of the circumstances" violated the appellants' rights to a fair and impartial jury trial. Thus the *Brasfield* problem was not held to require reversal *per se*. In the only other consideration of the problem, the District of Oregon held that the *Brasfield* rule was based on the supervisory powers of the Supreme Court. *Marsh v. Cupp*, 392 F.Supp. 1060, 1063 (D.Ore. 1975). On appeal the Ninth Circuit upheld the decision of the district court, but erroneously concluded that no *Brasfield* problem was presented by the facts of the case.[4] *Marsh v. Cupp*, 536 F.2d 1287, 1291, fn 9 (9th Cir. 1976).

In *Jenkins v. United States*, 380 U.S. 445 (1965), the Supreme Court considered a case in which the trial judge,

[3]Missouri has had a problem with the question. In *State v. Sanders*, 552 S.W.2d 39 (Mo. 1977), the jury had advised the court that it stood 9 to 3 *for conviction*, following which the court gave the "hammer instruction" which the court held was error. In a later case, *State v. Smith*, 556 S.W.2d 484 (Mo. 1977), the court approved of the numerical division inquiry and distinquished *Sanders*, *supra*.

[4]The state trial judge had made inquiry as to the numerical standing of the jury, but not whether they were for conviction or acquittal.

without making inquiry as to the numerical standing, stated to a divided jury: "Now, I am not going to accept this. You have got to reach a decision in this case." The Court found reversible error in that, "in its context and under all the circumstances the judge's statement had the coercive effect attributed to it." 380 U.S. at 446. This "totality of the circumstances" test has been used frequently by courts which have had to consider the effect of allegedly coercive instructions or comments to the jury. We mention the *Jenkins* test because the state and federal courts which have declined to hold that the *Brasfield* rule *per se* requires reversal have instead looked to the totality of the circumstances in order to determine whether an inquiry into the numerical division of the jury may have had a coercive effect. Courts have most frequently found such coercive effect when the inquiry is accompanied by an *Allen* instruction.

During the fifty-three years since *Brasfield* was decided, the Supreme Court has not had occasion to discuss the rule's applicability to state trials. In recent years, however, the Court has considered at length the relationship between requirements of the federal Constitution and state jury trials. In *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968), the Court firmly held that trial by jury in criminal cases is fundamental to the American system of justice, and that the Fourteenth Amendment guarantees a right of jury trial in all state criminal cases which would come within the Sixth Amendment's guarantee were they to be tried in a federal court. The Sixth Amendment right to jury trial in federal cases had always been held to be "trial by jury as understood and applied at common law," requiring a jury of twelve persons and a unanimous verdict. *Patton v. United States*, 281 U.S. 276, 288 (1930). Nevertheless, the Court held in decisions subsequent to *Duncan* that states may provide for juries of less than twelve persons, *Williams v. Florida*, 399 U.S. 78 (1970), and for less than unanimous verdicts, *Johnson v. Louisiana*, 406 U.S. 356 (1972), without denying due process. *Duncan* and *Williams* are notable for the concurring opinions of Mr. Justice Black advocating his incorporation theory that the Fourteenth Amendment incorporated the Bill of Rights and made it applicable to the states, and for the dissenting opinions of Mr. Justice Harlan which warned that the Court was creating a constitutional straitjacket for the states and doing great harm to the federal system.

In *Cupp v. Naughten*, 414 U.S. 141 (1973), the Court considered the effect of an instruction to the jury that every witness is presumed to speak the truth, in a trial in which the defendant elected not to testify. The appellant argued that such an instruction shifted from the state its burden to prove a defendant's guilt beyond a reasonable doubt. The Supreme Court held that the instruction did not offend the requirements of due process, and discussed the supervisory functions of appellate courts in a federal system:

> Within such a unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution. Thus even substantial unanimity among federal courts of appeals that the instruction in question ought not to be given in United States district courts within their respective jurisdictions is not, without more, authority for declaring that the giving of the instruction makes a resulting conviction invalid under the Fourteenth Amendment. Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.

414 U.S. at 146.

Thus the Supreme Court, in *Duncan*, has required states to provide criminal defendants with the Sixth Amendment right to jury trials, but has in subsequent cases granted the states significant leeway in matters related to the jury trial. An inquiry during deliberations as to the numerical split of a jury is in the nature of a supplemental instruction, and is most closely analogous to the situation before the Court in *Cupp v. Naughten*. We are of the opinion that the inquiry is essentially procedural in nature, absent any overt coercion upon the minority jurors. In any event, the jury knew how it was divided. Keeping in mind the admonitions of Mr. Justice Harlan in *Duncan* and *Williams*, we feel that under the principles of federalism the decision whether to allow the inquiry is best left to the supervising state court. Indeed, we

have expressed the opinion that there is some value to the inquiry in a federal case when the trial judge is deciding whether to declare a mistrial or otherwise excuse the jurors for dinner. *United States v. Rogers*, 289 F.2d 433, 435 (4th Cir. 1961).[5]

We assume that the Supreme Court, in *Brasfield*, had in mind the Supreme Court's limited corrective power over state courts which, in criminal cases, is narrower than that which the Court exercises over lower federal courts. In *United States v. Mitchell*, 322 U.S. 65, 67-68 (1944), the Court said, "Our sole authority [in state court proceedings] is to ascertain whether that which a state court permitted violated the basic safeguards of the Fourteenth Amendment." And in the landmark case of *McNabb v. United States*, 318 U.S. 332 (1943), it is said:

> For, while the power of the Court to undo convitions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice,". . . which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

318 U.S. 340.

Later, in *Rochin v. California*, 342 U.S. 165, 168 (1952), Mr. Justice Frankfurter, speaking for the Court, has this to say:

> Accordingly, in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the most far-reaching and most frequent basis of challenging State criminal justice, "we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due

[5] The *Rogers* case, in an opinion by Judge Haynsworth, involved an inquiry as to the substantial majority-minority standing of the jury, followed by the *Allen* charge which was incomplete and onesided, thus requiring a new trial. However, it is clear that the *Rogers* court applied the totality of circumstances rule and did not rest its decision solely on *Brasfield*. Indeed, the numerical division inquiry is minimized in *Rogers*.

> humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause authorizes." . . . Due process of law, "itself a historical product," . . . is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice.

For these reaons we are convinced that *Brasfield* was intended to formulate a policy for the federal courts to follow, and is not applicable *per se* to the state courts. Likewise, viewed within the totality of the circumstances, *United States v. Jenkins, supra,* neither the inquiry as to the numerical division of the jury nor the supplemental modest charge had the coercive effect attributed to them by the appellant. We look with particular favor upon the two admonitions in the modified *Allen* charge that no juror surrender any conscientious convictions.

The order of the district court denying the writ of habeas co us is affirmed.

AFFIRMED.

WINTER, Circuit Judge, dissenting:

I respectfully dissent.

There is no dispute between the majority and me that *Brasfield v. United States,* 272 U.S. 448 (1926), does not invalidate the state conviction in the instant case unless *Brasfield* was decided on constitutional grounds. Although the question is certainly not free from doubt, I, unlike the majority, think that application of the authority which controls our decision leads to the conclusion that the *Brasfield* rule is a rule of constitutional interpretation of the due process clause of the Fifth Amendment and it is therefore applicable to the states under the Fourteenth Amendment. I would therefore invalidate the conviction and direct that the writ issue unless North Carolina concludes to try Ellis anew.

I.

As the majority points out, *Brasfield* resolved the conflicting decisions which had been generated by the dictum in *Burton v. United States,* 196 U.S. 282 (1905), as to whether an inquiry into the numerical division of an undischarged

jury constituted reversible error. It held that, in the event of conviction, such an inquiry was reversible error, and it is clear that it held that such an inquiry *alone* constituted reversible error. In addition to the inquiry made during the jury's second day of deliberations, the trial court had given a form of *Allen* charge, *see* 8 F.2d 472 (9 Cir. 1925), but this fact was not mentioned by the Supreme Court, although argued to it; *see* 71 L. Ed. 345. After deciding that the inquiry required reversal, the Court added "[i]t is unnecessary to consider other assignments of error directed to the instructions given the jury at the time of its recall." 272 U.S. at 450.

Admittedly, the Supreme Court did not specify whether its decision was based upon its view of the requirements of the Fifth Amendment or was amerely an exercise of its supervisory power over inferior federal courts. All that it said was:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

272 U.S. at 450.

Since the Supreme Court did not identify the basis of its decision (constitutional or supervisory), one must look to the language it employed to determine that basis. If the inquiry it condemned "is coercive" and it is "essential to the fair and impartial conduct of the trial" that the inquiry alone be regarded as ground for reversal, I can only conclude that *Brasfield* rests on constitutional grounds. *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968), held that the right to a jury trial in a criminal case is "fundamental to the American

scheme of justice," so that the Fourteenth Amendment guarantees that the right attaches in all criminal cases in state courts where, were the case tried in a federal court, the Sixth Amendment guarantee to a jury trial would apply. In reaching that conclusion, the Court spoke to the instances in which rights guaranteed, *inter alia*, by the Fifth Amendment are also protected against abridgment by the states. Its language bears repeating:

> The test for determining whether a right extended by the Fifth or Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Powell v. Alabama*, 287 U.S. 45, 67 (1932); whether it is "basic in our system of jurisprudence," *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is "a fundamental right, essential to a fair trial," *Gideon v. Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests should this be. . . . Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee. (Footnotes eliminated.)

391 U.S. at 148-49.

Certainly *Duncan* holds that the right to trial by jury in criminal cases is a fundamental right.* Thus, I think it follows that a practice condemned because it is "coercive" and

*The majority cites two subsequent cases in which the Supreme Court has permitted states to deviate, within certain limits, from federal practice with regard to the number of jurors and the requirement of unanimous verdicts. *Williams v. Florida*, 399 U.S. 78 (1970); *Johnson v. Louisiana*, 406 U.S. 356 (1972). I think these cases inapposite. They were concerned solely with formal aspects of the jury. I do not read them to suggest that a judge may, consistently with the Fourteenth Amendment, conduct an inquiry of the jury which has a "coercive" effect.

destroys the "fair and impartial conduct of the trial" is condemned on constitutional grounds. Preservation of the purity of the jury's deliberations is furtherance of a constitutional objective, not merely the exercise of supervisory power for a desirable but non-constitutional purpose.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 78-6175

Bruce E. Ellis, Appellant,

vs.

Amos E. Reed, et al., Appellee.

ORDER

Upon consideration of the petition for rehearing, no request for a poll of the court being made on the suggestion for rehearing *en banc*, and with the concurrence of Judge Winter and Judge Hoffman.

IT IS ORDERED that the petition be, and the same is hereby, denied.

FOR THE COURT:

/s/Clement F. Haynesworth, Jr.

Chief Judge, Fourth Circuit

June 11, 1979

Supreme Court, U. S.
FILED
OCT 29 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-222

BRUCE E. ELLIS,

Petitioner,

—vs—

AMOS E. REED
Secretary of Corrections and the
Attorney General of the State of North Carolina,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

Opinion Below 1

Jurisdiction 1

Question Presented 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 1

Argument 2

Conclusion 4

TABLE OF CASES

Brasfield v. United States, 272 US 448 71 L Ed 345, 47 S Ct. 135 (1926) .....

Brasfield v. United States, 8 F2d 472 (9 Cir 1925) .....

Cupp v. Naughten, 414 US 141, 38 L Ed 2d 368, 94 S Ct. 396 (1973) .....

Siler v. Louisville and Nashville R. Co, 213 US 175, 53 L Ed 753, 29 S Ct. 451 (1909) .....

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OPINION BELOW
JURISDICTION
QUESTIONS PRESENTED
LEGAL PROVISIONS
STATEMENT OF THE CASE

Pursuant to Rule 40 of the Rules of the Supreme Court, these items are omitted.

ARGUMENT

THE ISSUE INVOLVED IN THIS CASE LACKS SUFFICIENT IMPORTANCE FOR REVIEW BY THIS COURT, WAS CORRECTLY DECIDED BELOW AND DOES NOT MEET ANY OF THE OTHER CRITERIA THE COURT VIEWS AS DETERMINATIVE OF THE EXERCISE OF ITS CERTIORARI JURISDICTION.

The issue in this case is whether or not the jury was unconstitutionally coerced into a verdict by the trial judge's inquiry into the jury's split during the course of supplemental instructions which were given approximately three hours after deliberation began, but only eight minutes before the verdict following a three-day trial. The facts are generally set out in the Petition's statement at pp 6, 7 and the court opinions below included as appendices (pp i-ii: v-vii). These facts have led each reviewing to conclude the issue against the petitioner and none of the reasons advanced by him in this application dictate a different treatment by this Court.

Petitioner first urges that the Court of Appeals erred in deciding that *Brasfield v. United States*, 272 US 448 71 L Ed 345, 47 S Ct. 135 (1926) was decision based on the court's supervisory power rather than the constitution, arguing that the court's failure to mention the constitution in *Brasfield* was given undue emphasis. In turn, he bases this on two propositions: (a) at the time of *Brasfield*, the court's decisions on the Sixth Amendment were not applicable to the state so that the constitution need not have been mentioned; and (b) the court's other constitutionally based decisions frequently did not reference a particular provision. Neither of these arguments should carry the day. Because the Sixth Amendment was not applicable to the states at the time of *Brasfield* and only the federal judiciary was then affected by it, the supposition would be that *Brasfield* was based only on the court's supervisory power for the reason that there was and is a preference for the avoidance of unnecessary constitutional decisions, *Siler v. Louisville and Nashville R Co.*, 213 US 175, 53 L Ed 753, 29 S Ct. 451, (1909) and a constitutional decision would have been unnecessary here. In light of this, petitioner's first reason should not cause this Court to issue a writ of certiorari.

Petitioner secondly urges that the Court of Appeals' view is in conflict with that of this Court on whether or not the inquiry here was coercive in nature..This is only superficially true for while this Court did state in *Brasfield* that in general the tendency of the inquiry involved here was coercive, it also noted the effect of the inquiry might vary widely from case to case. The facts of *Brasfield*, however, easily dictated the result and the supporting language used there. These facts are set out to some extent in the Circuit Court opinion (8 F2d 472) and show that in addition to the inquiry of the jurors on their split, the trial judge advised the jurors that the case was a very plain one, that it should give them no difficulty, that they should be sure their attitude toward reaching a verdict was based on the evidence; and generally the instructions appeared to reflect a very much heavier handed approach than the norm. None of these additional factors occurred in petitioner' case and therefore while abstractly speaking the effect of the inquiry might be thought to be coercive, its effect in the context of the jury instructions as a whole in this case was properly found not to have that effect. In light of this, petitioner's second reason should not cause this Court to issue a writ of certiorari.

Petitioner finally notes the split of authority between state courts on whether or not *Brasfield* is constitutional in nature. These cases are collected in the district court opinion at pp ix-x of the Petition. However, the split involved here is not such as to undermine the administration of justice throughout the country and therefore should not provide a basis for review. This is because those states which do not permit the inquiry are in step with the supervisory views of this court and therefore no review of the correctness of their decisions is desirable. Conversely, the three federal courts and the remaining states ruling on the question which do not prohibit the inquiry itself, do not permit a conviction to stand where the instructions as a whole are coercive. This is in line with the approach authorized by this Court since the time of *Brasfield* in *Cupp v. Naughten*, 414 US 141 38 L Ed 2d 368, 94 S Ct. 396 (1973) and shows that no injustice exists to be corrected in these jurisdictions by the Court's exercise of its certiorari jurisdiction. In light of this, petitioner's third reason should not cause this Court to issue a writ of certiorari.

CONCLUSION

For the substantive reasons in the opinions of the two courts below and for the reasons above made in response to the Petition itself, the petition for writ of certiorari should be denied.

Respectfully submitted,

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